Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

OPPOSITION TO MOTION REGARDING INFORMAL COMPLAINTS

NCTA – The Internet & Television Association ("NCTA") and USTelecom respectfully submit this Opposition to the Motion filed on September 18, 2017, by the National Hispanic Media Coalition ("NHMC") and others asking the Commission to incorporate into the record in the above-captioned proceeding the informal complaint materials recently released to them in response to NHMC's Freedom of Information Act ("FOIA") request, and to establish a new pleading cycle for public comment on those materials.[1] The Motion should not be granted given that it is based on false premises: that (1) the informal complaint materials are "directly relevant" to this proceeding;[2] (2) the Commission must incorporate these materials into the record *itself* or else risk "prevent[ing] directly relevant information from being admitted into the record";[3] and (3) the Commission must "reopen the administrative record," which has not yet closed, and set new comment deadlines in order to allow interested parties to provide their views on these materials.[4] Each of these contentions is entirely meritless, and NHMC utterly fails to meet its burden as a movant to demonstrate how any of these materials are relevant to the issues

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1 *See* Joint Motion To Make Informal Open Internet Complaint Documents Part of the Record and To Set a Pleading Cycle for Comment on Them, WC Docket No. 17-108, at 1 (filed Sept. 18, 2017) ("Motion").

2 *Id.*

3 *Id.* at 9.

4 *Id.* at 8.

in this proceeding. The Motion simply repackages discredited assertions about the supposed relevance of these materials set forth in NHMC's earlier motion requesting extensions of the comment deadlines in this proceeding[5]—a request that the Wireline Competition Bureau appropriately denied.[6] At bottom, the Motion appears to be little more than a smokescreen—bereft of substantive arguments or evidence to counter the Commission's sensible proposal to restore the prior Title I information-service classification for broadband Internet access service ("BIAS"), and aimed instead at prolonging this proceeding unnecessarily. The Commission therefore should deny the Motion.

DISCUSSION

The Motion begins by claiming—without citing a single example—that the informal complaint materials recently disclosed by the Commission are "directly relevant" to this proceeding.[7] This claim is demonstrably false. As a threshold matter, informal complaints have *never* been viewed by the Commission as relevant (much less necessary or critical) to the core issues of blocking, throttling, and paid prioritization in prior open Internet proceedings,[8] or by

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5 *See* NHMC Motion for Extension of Time, WC Docket No. 17-108, at 1-2, 5-8 (filed Jul. 7, 2017).

6 *See Restoring Internet Freedom*, Order, 32 FCC Rcd 5650 (WCB 2017) ("*NHMC Extension Denial Order*").

7 Motion at 1.

8 *See, e.g.*, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶¶ 75-103 (2015) (discussing the purported "need" for open Internet regulation without citing a single informal complaint); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 ¶¶ 11-42 (2010) (same).

courts reviewing the orders resulting from those proceedings.[9] And the Motion provides no cogent explanation as to why such materials would have any bearing on this proceeding.

Moreover, with respect to the specific informal complaints at issue here, the overwhelming majority have nothing to do with open Internet issues. This is true even for the informal complaints organized under labels like "blocking" or "throttling"; even a cursory review of the materials NHMC claims the Commission must include in the record reveals that the vast majority of those complaints do not allege anything that even remotely implicates the no-blocking or no-throttling rules.[10] It is therefore entirely appropriate that the Commission's webpage publicly posting these materials includes the following disclaimer, which the Motion entirely ignores:

> [T]he FCC receives many complaints and comments that do not involve violations of the Communications Act or any FCC rule or order. Thus, the existence of a complaint or comment filed against a particular carrier or business entity does not necessarily indicate any wrongdoing by any individuals or business entities named in the complaint or comment.[11]

Indeed, there is no evidence that any of these informal complaints led the Commission to undertake enforcement action against any broadband provider—a fact that further underscores the *lack* of relevance of these materials to this proceeding. It is worth noting that ISPs have long

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9 *See USTelecom v. FCC*, 825 F.3d 674, 694 (D.C. Cir. 2016) (discussing the asserted policy bases for open Internet rules without mentioning informal complaints); *Verizon v. FCC*, 740 F.3d 623, 643-49 (D.C. Cir. 2014) (same).

10 *See generally* FCC, Response to NHMC FOIA Request, *available at* https://www.fcc.gov/response-nhmc-foia-request ("FCC FOIA Response Disclosure"); *see also, e.g.*, FCC FOIA Response Disclosure, "Blocking," Aug. 24, 2017, at 40, 46, 53, *available at* https://www.fcc.gov/sites/default/files/foia-consumer-complaints-08242017-565-577-blocking.pdf (listing complaints under "blocking" that involve claims of "police profiling and harassment," assertions about being "banned from commenting on Breitbart," notifications appearing to come from Facebook indicating that the individual's "computer is infected with malware," etc.).

11 Response to NHMC FOIA Request.

committed to upholding the no-blocking and no-throttling principles of an Open Internet. If these informal complaints had actually demonstrated any meaningful violation of the Open Internet rules, then presumably the Commission's Enforcement Bureau would have taken action, at least by opening an investigation to gather additional facts. But it appears that no such actions were initiated. Notably, most of the informal complaints at issue were filed during Chairman Wheeler's administration[12]—in the wake of that Commission's determination that common carrier regulation was necessary to respond to potentially abusive practices, and at a time when the Commission's Enforcement Bureau was widely recognized for its aggressive posture.[13] And yet there is no evidence that the informal complaints from that era—or beyond—resulted in *any* enforcement action. That record undermines NHMC's claims that the mere filing of informal complaints constitutes evidence of improper conduct. Indeed, the fact that the Commission

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12 *See, e.g.*, FCC FOIA Response Disclosure, Complaint Data, "Blocking," Aug. 24, 2017, *available at* https://www.fcc.gov/sites/default/files/foia-complaint-data-08242017-565-blocking.xlsx (providing a list of the filing dates of all complaints categorized under the "blocking" label, and showing that 482 of the 619 complaints in that category, or about 78 percent, were filed prior to Chairman Wheeler's departure from the agency on January 20, 2017); FCC FOIA Response Disclosure, Complaint Data, "Throttling," Aug. 24, 2017, *available at* https://www.fcc.gov/sites/default/files/foia-complaint-data-08242017-565-throttling.xlsx (listing the filing dates of all complaints categorized under the "throttling" label, and showing that 1,240 of the 1,361 complaints in that category, or about 91 percent, were filed prior to Chairman Wheeler's departure).

13 *See* Remarks of Commissioner Ajit Pai at the PLI/FCBA 33rd Annual Institute on Telecommunications Policy & Regulation 5 (Dec. 3, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-336693A1.pdf (criticizing the Enforcement Bureau under Chairman Wheeler as marked by a "lack of accountability" and a "quest for headlines"); *see also* Remarks of Commissioner Michael O'Rielly International Bar Association Conference Communication Committee Session 2 (Sept. 20, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-341349A1.pdf (warning of overly aggressive enforcement on open Internet issues by Chairman Wheeler's Enforcement Bureau).

routinely *does* pursue enforcement action based on informal complaints when it finds that such complaints establish the existence of unlawful activity powerfully confirms this point.[14]

In any case, even if the informal complaint materials did have some relevance to this proceeding, there is no need for the Commission to place such materials in the record, as there is nothing preventing NHMC *itself* (or any other party) from submitting such materials into the docket. The Motion's suggestion that the only way these materials can enter the record is through some Commission action affirmatively "incorporat[ing]" them into the record is simply not true.[15] NHMC is free to put into the record whatever it believes to be relevant via *ex parte* letters (as the Commission rule on which the Motion is based makes clear),[16] and to make arguments about any claimed relevance in those letters.

None of the cases cited in the Motion suggests otherwise or imposes any duty on the *Commission* to place material into the record that is widely available to the public, especially where the purported relevance of that material is far from apparent. To the contrary, the D.C.

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14 *See, e.g., Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc.*, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 5418 ¶¶ 1, 13 & nn. 32-35 (2017) (proposing a penalty of $120,000,000 on an individual and his company for facilitating illegal spoofed robocalls, relying on various informal complaints filed by consumers, and noting that such robocalls are "the number one consumer complaint received by the Federal Communications Commission"); *Central Telecom Long Distance, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5517 ¶¶ 1, 9 & n.27 (2014) (proposing a penalty of $3.96 million on telecommunications carrier for apparent violations of cramming and truth-in-billing regulations based on "informal complaints" filed against the carrier); *see also* Inside the FCC, "What Are Consumers So Mad About? A Closer Look at FCC Consumer Complaints," WC Docket No 17-108, at 3, 5 (filed Aug. 30, 2017) (analyzing informal complaints filed at the Commission and finding that, while roughly 51 percent of those informal complaints concern robocalls and another 34 percent concern billing issues, only one to three percent are designated by complainants as "open Internet" or "net neutrality" complaints).

15 *See, e.g.*, Motion at 1 (asserting that the Commission itself should "incorporate" these materials "into the record in this proceeding"); *id.* at 7 (attacking the Commission for not "incorporat[ing] any of these documents into the administrative record").

16 *See* 47 C.F.R. § 1.415(d) note (allowing for ex parte presentations).

Circuit has made clear that the "substantial evidence" requirement in the Administrative Procedure Act ("APA") does not require the Commission to seek out every piece of evidence available that could possibly be relevant to the subject of a rulemaking and incorporate it into the docket.[17] The Commission appropriately relies on parties to bring issues and purportedly relevant evidence to its attention in a rulemaking and to build a substantial record. There is no legal or policy reason to deviate from that practice here—particularly where the Commission already has recognized that the materials at issue "do[] not necessarily indicate any wrongdoing" by broadband providers.[18] In such circumstances, it would be affirmatively misleading and inappropriate for the Commission even to suggest that these materials—none of which have led to enforcement actions or adjudicated violations—are relevant to the issues under consideration.

It is also entirely unnecessary to establish a new comment cycle or to "reopen the administrative record" as NHMC requests.[19] The record in this proceeding remains open, and as noted above, NHMC and other interested parties remain free to comment on the informal complaint materials via *ex parte* letters. NHMC's Motion is proof of this fact; it was filed after the reply comment deadline in the *Restoring Internet Freedom* docket (*i.e.*, August 30, 2017), during a week in which multiple other parties filed significant *ex parte* letters and other submissions, and yet all of these filings are obviously now part of the administrative record. This post-reply *ex parte* process—which most likely will continue for several months, as

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17 *See Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) (explaining that, for APA purposes, "'[s]ubstantial evidence does not require a complete factual record,'" and declining to vacate a Commission order where "the Commission used the evidence before it to make a reasonable prediction about the likely present and future effects of changing competitive pressures") (quoting *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1113 (D.C. Cir. 2003)).

18 FCC FOIA Response Disclosure.

19 Motion at 8.

Commission staff reviews the already extensive record in this proceeding—provides ample opportunity for NHMC or any other party to submit whatever it wishes and for interested parties to respond.[20] Indeed, the D.C. Circuit has ruled that a process that afforded parties just *two weeks* to respond by letter to new issues in the record after the end of the formal comment period but before the promulgation of the final rule satisfied the APA.[21] Given NHMC's clear ability to submit these materials into the record now and the existence of an ongoing *ex parte* process that will enable the thorough vetting of arguments relating to these materials, NHMC cannot show—and would be unable to show on appeal—"what additional arguments would have been made if the [Commission] had initiated another round of public comments."[22] The absence of any conceivable claim of prejudice dooms NHMC's request.[23]

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20 As noted above, the Commission posted *all* of the informal complaint materials that were provided to NHMC on the Commission's website, so the materials are now public for all to see, and parties thus can review and file *ex parte* letters attaching any of these materials that they claim are relevant to this proceeding. Additionally, the Commission appears to have organized the materials according to how complainants themselves categorized them, so it should be a straightforward matter for anyone who wants to raise arguments about the alleged relevance of these materials to do so.

21 *See Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir. 1988) (rejecting APA challenge where a new issue arising after the formal comment period and "communicated two weeks before promulgation" gave "industry petitioners at least a limited opportunity to focus a direct attack on" that issue).

22 *Pub. Serv. Comm'n of Dist. of Columbia v. FCC*, 906 F.2d 713, 718 (D.C. Cir. 1990).

23 The Motion's suggestion (at 6-7) that the Commission should have produced even *more* materials in response to NHMC's request lacks both credibility and merit. As the Wireline Competition Bureau noted in its July 17 Order, "Commission staff could have denied NHMC's FOIA request on its face as unreasonably burdensome," as the "release [of] all 47,000 complaints" and related materials required devoting significant resources to "review[ing]" each document and "redact[ing] personally identifiable information" prior to production. *NHMC Extension Denial Order* ¶ 4. But rather than deny the FOIA request outright, the Commission devoted significant resources over a very short timeframe in order to produce the substantial amount of materials it did. The Commission's response thus was more than reasonable under FOIA.

CONCLUSION

For the reasons discussed herein, the Commission should deny the Motion.

Respectfully submitted,

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